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No. 83-850

In The
Supreme Court of the United States
October Term, 1983

UNITED STATES OF AMERICA,
Petitioner,

vs.

JAMES CONNORS KARO, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF WILLIAM ROBERTSON HARLEY AND RICHARD MILES HORTON IN OPPOSITION

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QUESTIONS PRESENTED BY PETITIONER

1. Whether warrantless installation of a beeper inside a container of chemicals with the consent of the original owner violates the Fourth Amendment rights of a suspect in a drug manufacturing scheme to whom the container is subsequently transferred.

2. Whether the warrantless monitoring of signals from a beeper installed inside a container of chemicals that law enforcement authorities reasonably believe will be used to manufacture illegal drugs violates the Fourth Amendment when the monitoring occurs while the beeper is located within a home or other "private" area (such as a commercial storage locker).

RESPONDENTS' REFORMULATION OF THE QUESTIONS PRESENTED

1. Whether a citizen has a reasonable expectation of privacy in a sealed chattel expected to be delivered to him that would be abridged by the warrantless insertion of an electronic signalling device which was intended for the purpose of monitoring the movements of that chattel after it came into his possession.

2. Whether a citizen has a reasonable expectation of privacy that would be abridged by the warrantless operation and monitoring of an electronic signalling device located inside a residence or other private area.

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OPINIONS BELOW

The opinion of the Court of Appeals affirming the order of the District Court (Pet. App. 1a-15a)[1] is reported

[1]Petitioner's *Petition for Writ of Certiorari* and *Appendix* will be cited as Pet., Pet. App., etc. Respondent's (Harley and Horton) *Brief in Opposition* and *Appendix* will be cited at Resp., Resp. App., etc.

at 710 F. 2d 1433. The memorandum opinion of the District Court overruling the Government's *Motion to Reconsider* (Pet. App. 16a-22a) is not reported. The oral findings and decision of the District Court (RII 331-337) which was not cited nor reproduced in the Petition is reproduced herein at la et seq.

QUESTIONS PRESENTED

The United States presented the following two questions:

> 1. Whether warrantless installation of a beeper inside a container of chemicals with the consent of the original owner violates the Fourth Amendment rights of a suspect in a drug manufacturing scheme to whom the container is subsequently transferred.
>
> 2. Whether the warrantless monitoring of signals from a beeper installed inside a container of chemicals that law enforcement authorities reasonably believe will be used to manufacture illegal drugs violates the Fourth Amendment when the monitoring occurs while the beeper is located within a home or other "private" area (such as a commercial storage locker).
>
> Pet. at (i)

Along with opposing certiorari, the Respondents object to these questions as not being proper formulations of the issues, and would propose the following formulations in the alternative:

> 1. Whether a citizen has a reasonable expectation of privacy in a sealed chattel expected to be delivered to him that would be abridged by the warrantless insertion of an electronic signalling device

which was intended for the purpose of monitoring the movements of that chattel after it came into his possession.

2. Whether a citizen has a reasonable expectation of privacy that would be abridged by the warrantless operation and monitoring of an electronic signalling device located inside a residence or other private area.

Resp. at (i)

Respondents would point out that if one reverses the order of the Government's "Questions Presented," *supra*, they are virtually identical to those rejected by this Court in *Katz v. United States*, 389 U. S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967):

"A. Whether a public telephone booth is a constitutionally protected area so that evidence obtained by attaching an electronic listening recording device to the top of such booth is obtained in violation of the right to privacy of the user of the booth.

"B. Whether physical penetration of a constitutionally protected area is necessary before a search and seizure can be said to be violative of the Fourth Amendment to the United State (sic) Constitution."

Katz, 389 U. S. 349-350

Justice Stewart, writing for the Court, felt compelled to "decline to adopt this formulation of the issues," 389 U. S. at 350. The Court felt that the issues had been formulated in a "misleading way", 389 U. S. at 350 because the Government had relied upon the idea of a "constitutionally protected area" as against focusing upon the individual and his reasonable expectation of privacy, 389 U. S. at 350-353." "The Fourth Amendment protects people, not places," 389 U. S. at 350-351. Here some fifteen years after having their view of the issues rejected in *Katz* be-

cause the proper focus was not spatial, physical areas nor formal property interests the Government now renews the same "misleading" formulation in apparent hope that this Court will focus on legal "trespass" as against the reasonable expectation of privacy held by the citizen. The Government also encumbers its "Questions" with misleading surplusage dealing with drug traffic, etc., without even suggesting much less advocating that the license that they seek in this case would only be applicable to the drug traffic problem, (Pet. (I), Pet. 1, et seq.). The use of such language merely grafts argument upon issue in such a way as to deflect this Court's focus and to cloud its decision. The Respondents therefore urge that this Court reject the formulation of issues proposed by Petitioner and accept the reformulations proposed by Respondents.

I. The Decision Of The Tenth Circuit In Karo Is Not Only Correct, But Consistent With the Precedents Of This Court.

A. The Decision of the Tenth Circuit in Karo is Consistent With the Thrust and Spirit of the Controlling Precedents Laid Down by This Court.

1. *The Implantation of the Electronic Signalling Device.*

This issue should be analyzed in the fullest possible perspective. First, from the factual viewpoint we should note the following salient facts which cannot be disputed: (a) the sealed drum and its contents were legally possessed and must be considered as lawful chattels,[2]; (b) at

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[2]Even though the United States has conceded standing, the Respondents would point out that: (1) Horton, Harley, and Karo jointly purchased the ether through Muehlenweg,

(Continued on following page)

the time of installation, the electronic signalling device was intended to betray the presence of the sealed drum after it was delivered to the Respondents in this cause; (c) at the time of installation, it was anticipated that the electronic signalling device would find its way into at least one if not more private areas where an expectation of privacy presumably existed.[3]

After observing these facts, it is convenient to deal with the Government's justifications for a warrantless installation of this electronic signalling device even though such justifications overlap into the area of continued monitoring electronic signalling devices within private homes and storage lockers.

a. *"Substantial, if not Compelling [Interest]" (Pet. 15)*

(Continued from previous page)

each paying "$1,000.00", (RII 300); (2) the ether was delivered to Horton's house on Wellesley Street, (RIV Gov. Ex. 10); (3) the Respondents were recognized by Muehlenweg and the Government as the "ultimate users", (RII 258); (4) Horton and Harley personally rented both private storage lockers where the drums were kept, (RII 301), paid rent, (RII 301), had the keys, (RII 301, 314), and checked periodically on the contents; and (5) both Horton and Harley paid rent on the Taos house which was the ultimate destination and situs of the search, (RII 299-302), had lived in the house for some time, (RII 276, 298, 305), were living there at the instant of the search, (RII 116), and received the refunds of the rent after the search, (RII 299).

[3]The Government contended below and again admits here that the electronic signalling device was supposed to betray its presence in at least its ultimate destination which was expected to be a "clandestine laboratory," presumably an area where an expectation of privacy existed (see Pet. 13-17). Actually, though the Government could contend that it was anticipated that the device would travel by road, but had no actual travel or route plans at the time of installation.

The interest is that the Government's efforts at law enforcement would be aided by knowledge of the location and movement of its citizen's chattels. Toward this end, the Government cites *United States v. Martinez-Fuerte,* 428 U. S. 543 at 555 (1976), and similar cases, but to little avail. In *Martinez-Fuerte* this Court found the interest of combatting drug smuggling plus the interest of combatting alien smuggling plus the proximity of the international boundary to be compelling enough to justify a brief *stop and questioning* of the occupants *of a vehicle,* hardly the situation of our case. *Martinez-Fuerte, supra, Terry v. Ohio,* 392 U. S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968) and *United States v. Mendenhall,* 446 U. S. 544, 561-562 (1980) involve situations where the warrant requirement would actually frustrate the public interest because the delays or difficulties occasioned by meeting the constitutional standards at the moment of confrontation between police officer and suspect in the street in *Terry,* 392 U. S. at 9-11; at the moment of confrontation between Border Patrol officer and northbound traffic at a border checkpoint in *Martinez-Fuerte,* 428 U. S. at 556-557; and at the moment of confrontation between narcotics officer and suspect at an international airport in *Mendenhall,* 446 U. S. at 561-563. However, what would be the outcome if the public interest could co-exist with the Fourth Amendment interest without injury to either? In our case, warrants, orders to seal, extensions, and the like were routinely and easily obtained (RIV Gov. Ex. 5, etc.). In our case and in *United States v. Knotts,* — U. S. —, 103 S. Ct. —, 75 L. Ed. 55 at 59-60, the facts indicate: (1) prior knowledge; (2) arrangements with a chemical company to insert an electronic signalling device; and (3) arrangements for

monitoring a beeper, all facts which allow substantial time to obtain a warrant. Indeed, the non-existence of facts (1) and (2) in *Karo* or in *Knotts* would probably preclude installation of the electronic signalling device and remove the problem of balancing anything. Thus, we can see that the question of balancing the alleged "substantial, if not compelling [interest]" (Pet. 15) of the Government in this case is properly expressed as: Do our municipal, state, and federal government have such a "substantial, if not compelling [interest]" (Pet. 15) in the location and movements of a citizen's chattels so to overcome the minimal judicial inference mandated by the warrant requirement of the Fourth Amendment which would not endanger nor significantly impede the public interests?

b. *Minimal Intrusion*

The Government argues that because of "the limited intrusion, if any, on privacy interests resulting from beeper surveillance, use of a beeper to locate a source of illegal drugs is fully justified on the basis of reasonable suspicion that criminal activity is afoot". (Pet. 16), thereby seeking to bring the beeper into the *Terry v. Ohio* situation where a compelling public need (which we have already discussed) overcomes a limited intrusion. The Government argues that the intrusion is "slight" because the electronic signalling device only "broadcasts 'here I am'" (Pet. 14).[4] What the Government fails to acknowledge is that the *Terry* line of cases that it cites all require that *the intrusion*

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[4]This assertion is not quite correct, the electronic signalling device tells (1) "here I am"; and later, (2) "I am still here"; with continual monitoring; (3) "I have been here this long"; with a moving signal; (4) "I am moving"; and with a weak signal; (5) "I am far away", etc. With further predictable technological advances it could also tell: "I am in the northeast corner of the building"; or "I am being moved (so as to suggest use)."

be limited in all respects, extent of intrusion, duration, and locality, see *Terry, supra; Martinez-Fuerte, supra; Mendenhall, supra.* When we examine any of these cases and, for example, alter the duration factor, the result changes. *Mendenhall* becomes *United States v. Place,* — U. S. —, 103 S. Ct. —, 77 L. Ed. 2d 110 (1983) where the Court noted: . . . the brevity of the invasion of the individual's Fourth Amendment interests is an important factor in determining whether the seizure is so minimally intrusive as to be justifiable on reasonable suspicion. . . . [thus] the 90-minute detention of respondent's luggage is sufficient to render the seizure unreasonable, 77 L. Ed. 2d 122, citing *Dunaway v. New York,* 422 U. S. 200, 99 S. Ct. 2248, 60 L. Ed. 2d 824 (1979). What is the "limited intrusion" is for five months as in our case instead of for 90 minutes? The same result happens even more forcefully in *Terry* and in *Martinez-Fuerte.* What result when officer McFadden pats and frisks John Terry for five months? What results when Amado Martinez-Fuerte is questioned for five months?[5] Different result? The limited nature of the intrusion is only limited in the scope of the search if it is limited in that respect.[6] Limitations in the scope of the search have never in themselves been sufficient. Since this Court's opinion in *Chadwick* applies the Fourth Amendment to a person's things and containers and since *Place* places a duration requirement on reasonable suspicion intrusions on things and containers, it would follow that *Terry, Martinez-Fuerte,* and *Mendenhall* lead the Government back to the warrant requirements of the Fourth Amendment.

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[5]Location is also a factor which must be limited. What if Terry is frisked at five different houses and two different storage areas?

[6]See Footnote 4, *supra.*

c. *The Tenth Circuit Application of Katz*

The Tenth Circuit in *United States v. Karo,* 710 F. 2d 1433 (10th Cir. 1983) held that a warrantless installation of an electronic signalling device into the drum of ether under these circumstances was in violation of the Fourth Amendment, 710 F. 2d at 1439. In reaching this decision, the Tenth Circuit noted that this Court in *Knotts,* 103 S. Ct. at 1082 n*, had not reached this issue because it was not raised. The Tenth Circuit built upon its Circuit precedent of *United States v. Clayborne,* 584 F. 2d 346 (10th Cir. 1978) which agreed with the proposition "that the fact that the Defendant (sic) initially had no rights in the chemical boxes was not of any significance since they later obtained lawful possession, and the agents sought to use the electronic devices after this," 584 F. 2d at 349, 349 n.1. However, the primary thrust of the *Karo* opinion was that the *Katz* analysis of the citizen's "legitimate expectation of privacy" compelled this result, *Karo,* 710 F. 2d at 1438. In applying *Katz,* the Tenth Circuit wrote:

> All individuals have a legitimate expectation of privacy that objects coming into their rightful ownership do not have electronic devices attached to them, devices that would give law enforcement agents the opportunity to monitor the location of the objects at all times and in every place that the objects are taken, including inside private residences and other areas where the right to be free from warrantless governmental intrusion is unquestioned.
>
> 710 F. 2d at 1438.

In contrast one can easily overlay the Government's arguments in this case over the facts in *Katz.* The Government would argue that: (1) the phone booth is owned by the phone company not by Katz, 389 U. S. at 352-353; (2) the electronic surveillance device was implanted on the

booth before Katz entered, 389 U. S. at 354 n.14; (3) Katz has no rights outside the booth, 389 U. S. at 352; (4) Katz enters of his own free will, 389 U. S. at 352-54; and the intrusion is minimal since the device does not intrude physically into the booth, 389 U. S. at 353. Seen from another viewpoint, would the *Katz* Court have let Katz's private conversations be monitored by an electronic surveillance device secreted within a box of groceries before Katz purchased them? Thus we can see that the facts of installation are actually inconsequential in comparison to the evaluation of the citizen's reasonable expectation of privacy which is the correct standard in such a case.

As in the formulation of the issues (Pet. (i)) the Government attempts to avoid the expectation of privacy analysis through a series of limited questions: Was not Muehlenweg the title owner (though not the legal owner) of the ether; did not Muehlenweg give consent to the Government; was not the electronic signalling device planted in the drum before delivery to Messrs. Karo, Horton, and Harley, etc.? These questions are of minimal importance in comparison to the central issue they mask. Would a citizen be justified in relying on an expectation of privacy in his personal possession to the effect that these items were not electronic transmitters continually betraying their location and movement to law enforcement officers of the city, state and nation where he resides? This is the central question which the Government avoids. The reason for their avoidance is found in the answer that is compelled by the question.

d. *Circuit conflict and Other Reasons*

Respondents admit that the Circuits are in apparent conflict regarding the need of a warrant to install an elec-

tronic signalling device in a citizen's chattel, compare *Karo* with *United States v. Lewis,* 621 F. 2d 1382, 1388 (5th Cir. 1980); *United States v. Bruneau,* 594 F. 2d 1190, 1194 (8th Cir.), cert. denied, 444 U. S. 847 (1979); *United States v. Bailey,* 628 F. 2d 938, 943 (6th Cir. 1980); and numerous Ninth Circuit cases such as *United States v. Bernard,* 625 F. 2d 854, 860 (9th Cir. 1980). Respondents would note that these cases precede both *Karo* and this Court's own opinion in *Knotts* wherein three concurring members of this Court voiced strong concern about the legality of the warrantless installation, *Knotts,* 75 L. Ed. at 65, 66 and where the opinion of the Court was careful to add that the issue was not decided because it was not raised, *Knotts,* 75 L. Ed. at 60 n.*. Respondents assert that consideration of this Court's opinion in *Knotts* together with consideration of a denial of certiorari in this cause by Courts in conflict could easily erase this conflict. Aside from this, the question is clearly insubstantial because (1) the Government did obtain a warrant in this case and now is in effect asking only for a retroactive approval of its international misrepresentation in the warrant affidavit, and (2) this question would not be determinative of the case if answered in the Government's favor because such an answer would still leave the second issue which revolves around the operation and monitoring of electronic signalling device.

2. *The Operation and Monitoring of the Electronic Signalling Device.*

The government seeks to justify the warrantless operation and monitoring of the electronic signally device for over five months[7] in five houses and in two private

[7]The Government admits that the electronic signalling device was utilized to locate the ether in new locations several

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storage lockers as a practice that only requires "reasonable suspicion." (See Pet. 13-16).

a. *Virtually Unanimity in the Circuits.*

The Government urges this in spite of the fact that even Justice Rehnquist specifically observed in *Knotts* that: "Respondent Knotts, as the owner of the cabin and surrounding premises to which Petschen drove, undoubtedly had the traditional expectation of privacy within a dwelling place insofar as the cabin was concerned," *Knotts,* 75 L. Ed. 2d at 62; and quoted *Johnson v. United States,* 333 U. S. 10, 13-14, 68 S. Ct. 367, 92 L. Ed. 436 (1948) for the proposition that:

> Crime, even in the privacy of one's own quarters, is, of course, of grave concern to society, and the law allows such crime to be reached on proper showing. The right of officers to thrust themselves into a home

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times. Indeed, since there was a paucity of surveillance the trail of the ether would have been lost four times but for the information provided for by the electronic signalling device. (See RIV. Govt. Ex. 6, 7, and 10). On these occasions the electronic signalling device's signals betrayed the ether's presence from within two private homes and two private storage lockers, (RIV. Govt. Ex. 6, 10), after significant lapses of time. The Government states as fact that "this same information could have been obtained by usual surveillance," (Pet. 12); however, no evidence was offered that the drums would have been visible to visual surveillance at the times when the drums were moved and temporarily lost, (See Pet. 2-9). The Government has no idea whether the drums were visible or whether they were (1) covered, (2) crated, or (3) placed into a vehicle, van, or pick-up which had been backed into the garages of the homes or into the storage areas so as to block visibility of the transfer. The Government can only speculate as to nature of the pick-up, van, helicopter, or whatever which transferred the drums. In seeking to equate its sporadic visual surveillance in this case with that in *United States v. Knotts,* No. 81-1802 (Mar. 2, 1983), the Government engages more in wishful thinking than in facts actually observed.

> is also of grave concern, not only to the individual, but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search, is as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent. *Johnson v. United States*, 333 U. S. 10, 13-14, 68 S. Ct. 367, 92 L. Ed. 436 (1948) (footnote omitted), quoted with approval in *Payton v. New York*, 445 U. S. 573, 586, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980).

75 L. Ed. 2d at 62.

Every circuit save the Ninth[8] (which has not dealt with the issue since *Knotts*) has uniformly drawn a "bright line" in front of the residence and other private areas, see *Karo, United States v. Moore*, 562 F. 2d 106 (1st Cer. 1977), cert. denied, 435 U. S. 926 (1978), *United States v. Bailey*, 628 F. 2d 938, 944 (6th Cir. 1980); *United States v. Cassity, et al.*, Slip Opinion Nos. 81-1565 et seq. (October 31, 1983). Both the Tenth Circuit in *Karo* and the Sixth Circuit in *Cassity* specifically utilized this Court's strong words in *Knotts* to reach their result, *Karo*, 710 F. 2d at 1439-1450; *Cassity*, (Lexis Opinion), at pp. 4-5. It is anticipated by Respondents that examination of *Knotts*, *Karo*, and *Cassity* will bring the Ninth Circuit into the fold thereby obviating any need for certiorari.

b. *The Dangers Inherrent in Reducing the Protections of a Private Home to Accommodate Technological Advance.*

Apparently the majority of this Court took little notice of the grim prophesies that Counsel for Respondent made in *Knotts*, 75 L. Ed. 2d at 63, stating in effect that

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[8]See *United States v. Brock*, 667 F. 2d 1311, 1318-1322 (9th Cir.) cert. denied No. 81-6922 (Mar. 7, 1983), etc.

1984 would be handled by the Court when it "should eventually occur." In *Knotts*, this Court noted that it was not encountering "twenty-four hour surveillance", 75 L. Ed. 2d at 63, nor intrusion into "the privacy of one's own quarters", 75 L. Ed. 2d at 62. Now, less than a year later, the Government unabashedly uses arguments identical to those used in *Knotts* to gain justification for five month surveillance involving five private residences and two private storage areas. Cannot this Court see where this juggernaut is headed?

For the first time some members of this Court are attempting to exempt technological advance from the Fourth Amendment, 75 L. Ed. 2d at 63-64,[9] arguing that the Fourth Amendment does not prohibit police efficiency not only stands *Katz* on its head, but states a false argument. If the Government were to develop a directional microphone in the future (if it already has not) which could penetrate the walls of a residence and overhear conversations within, does the expectation of privacy in *Katz* give way to police efficiency? If the Government were to develop a microwave transmitter and receiver in the future (if it already has not) which could penetrate the walls of a dwelling and not only overhear the conversations, but record the movements and actions within, does *Katz* again defer to efficiency? Unless the framers of our Bill of Rights intended that our liberties and private lives would fade away as our technological expertise increased, this is constitutional heresy.

And we have not seen the last of technological advance. The possibility that the Government may one day

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[9]However, Justice Stevens observed that *Katz* held differently and voiced considerable concern, 75 L. Ed. 2d at 66.

be able to electronically imprint or otherwise tag its citizens and their possessions and monitor their movements simultaneously through computers which already have such capability should be a sobering, if not chilling thought to the members of this Court. If there was any central theme in George Orwell's Magnus Opus it was that if one waits until *1984* to confront *1984* it is much, much too late.

II. The Writ Of Certiorari Should Not Be Granted Because The Suppression Ordered Is Alternatively Justified Under The District Court's Supervisory Powers.

A. The Misleading Nature of the Affidavit.

Looking into the basis for the District Court's findings that the warrant affidavit was misleading we must review the warrant affidavit. In sum, (1) the affidavit listed Muehlenweg as the target even though he was working for the Government at the time, (RII 169), and even though the Government knew who the true targets were, (RII 170-171, 179); (2) the affidavit listed prior seizures of amphetamines in lockers and in laboratories traced to Muehlenweg even though the Government knew that these seizures had nothing to do with the real targets of the investigation nor with the investigation itself, (RII 167-169); and the affidavit implied that the Government suspected that the ether would be used as a precursor chemical utilized "to manufacture" amphetamines when the Government knew that they were conducting a "cocaine" investigation, (RII 108, 179).

Buried in a footnote in Petitioner's "Statement" is the statement of alleged fact that "the Prosecutor orally ad-advised the issuing Judge" that "Muehlenweg [was an informant]" and also orally advised him that "information had been omitted from the warrant application to

preserve Muehlenweg's confidential informant status," see Pet. 4 at n.3. These alleged facts set the stage for the Government's further declaration, buried in another footnote, to the effect that "because the inaccuracies in the written warrant application were not designed to mislead the magistrate[10] (sic), . . . we believe the District Court erred in invalidating the beeper warrant, . . .," but since the issue was not "preserved on appeal, [it] is not presented here," Pet. 6-7 at n.4.

This is indeed what the Government presented at hearing. It is not what the District Court found as fact. In his oral findings, United States District Judge Gratton declared that:

> Since the government created that situation, that conflict, it's easy to resolve, it goes against the government. I find that the Judge was not told anything outside of the affidavit, if that is material.
>
> (RII 332).

In his written findings, the District Judge stated clearly:

> *It must be made clearly noted that the Court is not finding that the off-the-record statements claimed to have been made by the Assistant United States Attorney and the DEA Agent were in fact made to the issuing Judge.* Such a determination is unnecessary under the law. Were such a determination necessary, however, the Government has, by pursuing this course of action, created the untenable situation where the facts as to what transpired could only be resolved by the testimony or affidavit of the issuing Judge. Indeed in this case the defendants offered to obtain a

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[10]Actually, the false affidavit was not presented to a "magistrate," but to U. S. District Judge Meacham himself in his own chambers, (RII 208).

> statement or affidavit from the issuing Judge,[11] which offer was refused by the Court. Such a situation cannot even be contemplated, for it would create the impossible situation where one Judge would be called on to pass on the credibility of another. (Emphasis added.)
>
> (RI 15).

The Respondents have always taken a very firm position regarding the misleading nature of the affidavit and its invalidity.[12] Specifically, they would show this Court: (1) That no oral representations were made, (RII 332); (2) that no security interest justified oral representations;[13] (3) that even if oral representations were made, the Government admits that they were unsworn; thus they could not be considered; (RII 171, 246); (4) that even if oral representations were made, they were not recorded or

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[11]After being surprised by the alleged oral supplementation, Defense Counsel ran across the hall to interview U. S. District Judge Meacham, (RII 287) and returned with a proffer that Judge Meacham did not recall any oral supplementation or explanation of the warrant affidavit, (RI 15).

[12]Contrary to the facts set forth in the Petitioner's Statement, Respondents below filed a specific, sworn Motion to Suppress because of material falsehoods in the warrant, based on facts gleaned from a painstaking defense investigation.

[13]At the District Court hearing, the Government defended its "good faith" bad faith by maintaining that a relative of Muehlenweg worked as a clerk in the U. S. Magistrate's office and that his life would be jeopardized if his identity as an informant was revealed, (RII 234-242). The Respondents reported: (1) that the Government could have designated Muehlenweg in the affidavit as an anonymous confidential informant, (RII 240-242), inasmuch as the DEA or U. S. Attorney's office admitted that they were aware of such a procedure; and (2) that there was no showing that the relative in the Magistrate's office would have had any access to a District Court's *Order* sealed under Order of the Court, (RII 174, 265-266), or that the United States had reason to suspect the relative would be able to gain access, (RII 265-266), or that the relative would have used the information to harm Muehlenweg if he somehow was able to gain access to the sealed document.

transcribed as required by F. R. Cr. P., Rule 41(e) and thus could not be considered; (RII 247-249); (5) that even if oral representations were made in the manner alleged by the Government (a) identifying Muehlenweg as a confidential informant, and (b) explaining that information had been omitted from the affidavit (Pet. 4 at n.3) there still would be no probable cause.[14]

The District Court accurately summed up the affidavit: "putting it bluntly it is as phoney as a three-dollar bill" (RII 332). In this cause, a high-ranking law enforcement officer of the Federal Government together with an assistant United States Attorney, who was an officer of the United States and of the Court intentionally committed an intentional and flagrant violation of not only the Fourth Amendment Commandment, but also the integrity of the District Court. For when their duplicity was uncovered they sought to make the District Court an accomplice in their deeds,[15] as if the District Court would have approved this warrant affidavit with the knowledge that the target was not a target, that the suspicious events recited were not relevant to the investigation at hand, and that the offenses recited were not the ones under investigation. In seeking to do this, they merely damaged themselves further. Judge Bratton declined to accept their story told after class. Viewing the suppression that he

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[14]If the District Judge accepted the oral explanation that Muehlenweg was an informer and that information was omitted (Pet. 4 at n.3), we would still have the same effect as excising the Muehlenweg portions of the indictment. The Government admits that it did not tell the Judge (1) the names of the real targets (RII 170-171, 179), that it was a cocaine investigation, (RIII 108), that the seizures listed in the affidavit did not concern this investigation (RIII 167-169), etc.

[15]Upon interview by Defense Counsel, District Judge Meachum did not recall extraneous remarks, (RII 287).

knew he had to order, Judge Bratton felt compelled to add: "We do have a very unfortunate situation, not the least of which is that the confidence of the Court and the affidavits that might be presented to it, I would say, is shaken, at a minimum." (RII 331).[16]

B. The Supervisory Power of the Court.

The Respondents argued below[17] that if the Fourth Amendment could not be applied to the appalling situation in this cause, then suppression is justified under the Court's supervisory powers. In examining a situation involving blatent intentional misrepresentations in the search warrant affidavit, the Seventh Circuit in *United States v. Cortina,* 630 F. 2d 1207 (7th Cir. 1980) declared:

> Unless officers of the law know that the consequences of deliberate misrepresentations will be the suppression of the evidence, "lawless or reckless misconduct" will not only be encouraged, but invited. *Id.* "The bulwark of the Fourth Amendment protection, of course, is the Warrant Clause, requiring that, absent certain exception, police obtain a warrant from a neutral and disinterested magistrate before embarking upon a search." *Id.,* at 164, 98 S. Ct. 2681. Unless we deter behavior such as Brown's, that bulwark will become a Maginot Line, laughingly circumvented by those sworn to respect it. Courts must act in their own self-defense against brazen violations of their procedures. We must draw the line at misconduct occurring within our own house. *Cortina,* 620 F. 2d 1216-1217.

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[16]Respondents have dealt with this subject at length here because they seek to justify suppression upon an alternate ground: That the purpose of preserving the Court's integrity demands that this evidence be suppressed under this Court's supervisory powers if it is not suppressible under the Fourth Amendment.

[17]See *Brief for Appellees* (Horton and Harley) at pp. 35-39.

In our case, the situation is even more egregious than was the case in *Cortina,* for in our case the agents of law enforcement are aided and abetted by a United States Attorney. If the District Court cannot reach such conduct then it is a prisoner in its own chambers, see also *Olmstead v. United States,* 277 U. S. 438, 485, 48 S. Ct. 564, 72 L. Ed. 944 (1928); *McNabb v. United States,* 318 U. S. 332, 63 S. Ct. 608, 87 L. Ed. 2d 819 (1943); *Upshaw v. United States,* 335 U. S. 410, 69 S. Ct. 170, 93 L. Ed. 100 (1948); *Mesarosh v. United States,* 352 U. S. 1, 77 S. Ct. 1, 1 L. Ed. 2d 1 (1956); *Mallory v. United States,* 354 U. S. 449, 77 S. Ct. 1356, 1 L. Ed. 2d 1479 (1957); *Elkins v. United States,* 364 U. S. 206, 80 S. Ct. 1437, 4 L. Ed. 2d 1669 (1960).

CONCLUSION AND PRAYER

If the United States Constitution is seen as extolling the virtues of ordered liberty, then the Bill of Rights must be considered as supporting the view that that Order will tend to order liberty about more and more as the years pass and thus order should itself be restrained in some manner.[18] The central amendments to the Bill of Rights

[18]Comments of Mr. James Madison,

"It appears to me that this House is bound by every motive of prudence, not to let the first session pass over without proposing to the State Legislatures some things to be incorporated into the Constitution, that will render it as acceptable to the whole people of the United States, as it has been found acceptable to a majority of them. I wish, among other reasons by something should be done . . . [toward adopting a Bill of Rights] that those who have been friendly to the adoption of this Constitution may have the opportunity of providing to those who were opposed to it that they were as sincerely de-

(Continued on following page)

attempt to protect a core of rights thought to be crucial to the liberty of the individual against Government's intrusion. Many of these amendments involve or overlap the issue of individual privacy. For example, the First Amendment limits Governmental infringement of "freedom to associate and privacy in one's associations," *N.A.A.C.P. v. Alabama*, 357 U. S. 449, 462, 78 S. Ct. 1163, 2 L. Ed. 2d 1488; the Third Amendment protects the privacy of the home against Governmental peacetime quartering of soldiers; the Fourth Amendment protects those spheres in which a person has a "reasonable expectation of privacy," whether in public or in private, *Katz v. United States*, 389 U. S. 347, 350-353, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967); and the *Katz* Court also noted that "the Fifth Amendment too, 'reflects the Constitution's concern for [the right of each individual] to a private sphere where he may lead a private life,'" citing *Tehan v. Shott*, 382 U. S. 406, 416, 86 S. Ct. 459, 15 L. Ed. 2d 453 (1966), *Katz*, 389 U. S. at 350, n. 5.

(Continued from previous page)

voted to liberty and a Republican Government, as those who charged them with wishing the adoption of this Constitution in order to lay the foundation of an artistocracy or despotism. It will be a desirable thing to extinguish from the bosom of every member of the community, any apprehensions that there are those among his countrymen who wish to deprive them of the liberty for which they valiantly fought and honorably bled. And if there are amendments desired of such a nature as will not injure the Constitution, and if they can be ingrafted so as to give satisfaction to the doubting party of our fellow-citizens, the friends of the Federal Government will evince that spirit of deference and concession for which they have hitherto been distinguished. * * * There is a great body of the people falling under this description, who at present feel much inclined to join their support to the cause of Federalism, if they were satisfied on this one point. We ought not to disregard their inclination, but, on principles of amity and moderation, conform to their wishes, and expressly declare the great rights of mankind secured under this Constitution." Gales, *Debates and Proceedings in the Congress of the United States*, Vol. I (Washington: Gales and Seaton 1834), at Col. 448-449.

One of the more crucial elements of this bright line is the Fourth Amendment which "protects individual privacy against certain kinds of Governmental intrusion, but its protections go further . . . ," *Katz*, 389 U. S. at 350.[19] Our forefathers did not intend the Fourth Amendment as a law enforcement facilitation act of 1790-91. Rather, the Fourth Amendment was meant to do exactly what its critics complain that it does, impede and hinder law enforcement. Of course it was not intended to do so for the mere sake of impeding and hindering the forces of order, but rather for the purpose of protecting that private sphere upon which Government may not transgress at will. In considering these deliberate constraints placed upon law enforcement, we must be careful to remember that our founding fathers were intimately familiar with the onerous burden that these brief written passages would place on those charged with maintaining the public order and safety. They knew better than we the dangers posed by granting citizens those rights which would allow many of their private activities to proceed not only unchecked but unmonitored. To this writer's knowledge, no justice sitting on this Court has experienced anything similar to the crucible of momentous events in which their ideas of liberty and order were forged. To this writer's knowledge, no justice sitting today is able to draw on the personal experiences of having conspired to deprive the Government of its duties and tariffs; of having met in secret plotting high treason and insurrection; of

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[19]Although the merits of some proposed amendments in the Bill of Rights were debated and some actually rejected, the founders were so convinced of rightness and need for the protections of the Fourth Amendment that the debate centered solely upon the wording of the Amendment as against the merits of whether it should or should not be adopted. *Debates*, Vol. I at 783-785.

having stored arms in illegal caches; of having formented rebellion against lawful authority; or of having brought this treason and insurrection into full fruitation, deposing by force the authority that previously had governed them. We have never walked in their footsteps, yet we are charged with the solemn and sworn duty to uphold the very document which was so conceived. It is not an easy task. We can only attempt to remove ourselves from our comparatively complacement and pedestrian existence and to approximate the spirit which gave birth to the Bill of Rights, and specifically the Fourth Amendment. Looking at the Bill of Rights in this light, one is amazed that these former insurrections would endanger their own handiwork by deliberately making our infant Government more vulnerable than the great power that they had just overthrown. Such courage!

We who have received their legacy find ourselves in a nation of unequalled power and plenty, but yet we have been cheated out of a portion of our inheritance. We do not have that courage. Though our nation is a giant among nations, secure in might and wealth, we have grown faint-hearted and timorous in our maturity. The same Government which in its infancy shouldered the burden of the Fourth Amendment and walked steadfastly forward now stands before this Court with its hat in its hand, asking to be relieved of a portion of that burden. This Government pleads that it is weak and vulnerable and that the enemies of order wax strong. This Government finds the threat posed by the problem of drug traffic to be "substantial, if not compelling" (Pet. 15) in the context of Fourth Amendment. Substantial? Compelling? To this writer the problem is as "substantial" as the need of the British Crown to collect its duties on tea and other articles so as

to replenish its nearly bankrupt treasury so that it could continue to hire soldiers and generally provide for the welfare and security of its subjects. Every generation faces its own crises, threats, and challenges. Looking from the birth of nation forward, we see objections to Federal taxes on whiskey developing into actual rebellion; further war with England with our very capitol in flames; civil war which produced conflict and desolation of an unequalled magnitude; a world war; a crusade against alcohol in which law enforcement actually had to admit defeat; another world war; the threat of nuclear holocaust; the problem of drug use and drug traffic; the problem of massive flow of illegal aliens; etc., etc.; to name a few of the threats that we have faced. If we accept the fact that every one of these problems of threats is a "substantial, if not compelling" basis for further reduction in the scope of the Fourth Amendment, then we have accepted the piecemeal repeal of the Fourth Amendment and the only question remaining is the actual date of its final demise. This is because threats, problems, and crises will always be occuring barring the advent of the millenium. If we accept that the crises of each generation justify further diminishment of the Fourth Amendment, then we must accept the fact that we have adopted a course of gradual repeal of the Fourth Amendment by judicial acquiescence to the popular clamor of the moment; and that we are in effect rewriting their work because our generation is not as capable or courageous in facing its problems as were the generations before us, (or else simply feels that it is not). In this regard, we cannot help but note that our founding fathers did not consider the very real threat of further insurrection in a revolution-ravaged land to be so

"compelling" as to defer or delay passage of the Fourth Amendment in 1790-91.[20]

Hand in hand with this fear of "modern problems" we find a growing array of modern devices which in fulfilling their purpose of aiding law enforcement threaten to erase the private sanctuaries of home and office by technological fiat. These devices have been a boon to those who find the Fourth Amendment anachronistic if not dangerous, but yet lack the temerity to suggest outright repeal or avoidance of the amendment. They see clearly and correctly that a mere disinclination against applying the Fourth Amendment to the inroads created almost daily by science will achieve the same result in the end. Thus, the embarrassing rejection of the ideals of our founding fathers can be viewed as a much more palatable acquiescence to "progress." This writer finds this process just as repugnant to the oath which we all take to uphold the Constitution as would be an outright refusal to enforce the Fourth Amendment. Since we have long since accepted the notion that other portions of the Constitution should be expanded and interpreted so that they may encompass modern situations, failure to do so in the case of the Fourth Amendment will amount to intentional repeal. We have in the wealth of this Court's experience and precedent, the tools to adopt the Fourth Amendment to the changing world in which we live. *Katz* is of course the key to devising a solution which would both apply and uphold the Fourth Amendment. There the Government made a major attempt to shield its new technology from

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[20]See comments of Mr. James Madison, "it appears to me that this house is bound by every motive of prudence, not to let the first session pass without proposing . . .," etc. *Debates*, Vol. I, 448-449, Resp. at n.18, *supra*.

the strictures of the Fourth Amendment, stressing that the device in *Katz* did not penetrate the "protected" enclosure although it was technologically capable of overhearing conversations within. This Court made short work of that argument declaring explicitly that the fact could have "no Constitutional significance," and declaring implicitly that technology would not be allowed to abridge a citizen's reasonable expectation of privacy regardless of the novel method of surveillance or detection utilized, *Katz*, 389 U. S. at 352-354. The Government's arguments in this case that the ether drum is not a protected area, that the privacy of a home is not violated by the presence of a broadcasting device therein, and that an electronic signalling device is only a limited intrusion are mere shades of arguments used and rejected in *Katz*, 389 U. S. 347 at 352, 354 at n. 14.

The Fourth Amendment is there, the tools to apply it to this new technology are there, and the dangers of not applying it are legion. The thoughtful decision of the Tenth Circuit in *Karo* not only follows the true spirit of *Katz*, but is consistent with the controlling precedents of this Court. The Government on the other hand walks into this Court with unclean hands and beseeches this Court to not only overturn *Karo* decision and to diminish the influence of this Court's landmark decision in *Katz*, but also to place a burgeoning area of technology beyond the reach of the Fourth Amendment, and beyond its guarantees of our privacy. The ideals of the Fourth Amendment are only real if we have the courage and diligence to enforce them.[21] And this must be done against all threats, whether

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[21]Respondents would point to unenforced guarantees of privacy found in various constitutions throughout the world. For example, see *U.S.S.R. Constitution*, Article 55, "Citizens of the U.S.S.R. are guaranteed inviolability of the home," etc.

ancient intrusions or the novel forms created by the inexorable progress of technology. The Respondents pray that this Court enforce the Fourth Amendment in this cause by letting the thoughtful opinion of the United States Court of Appeals stand as it is and by denying certiorari to the Government in this cause.

Respectfully submitted,

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APPENDIX A

Oral Decision of the District Court

THE COURT: Thank you very much, counsel. We do have a very unfortunate situation, not the least of which is that the confidence of the Court and the affidavits that might be presented to it, I would say, is shaken, at a minimum. I will just—the Motion to Suppress will be granted and I will give you my reasons why.

Well, a chance to make some law in the Tenth Circuit on various points here, if you want. First of all, as to whether a warrant is needed for a beeper under these circumstances, there is, of course, a split in the circuits on that issue. It has been my feeling straight along, that a beeper is an intrusion; it's a search. It should require a warrant. Government agencies should not be free to just implant them at will. It should come through the normal Fourth-Amendment warrant probable-cause process. And I would say very particularly, so I realize that one circuit, I think the Ninth or somebody—I think the Ninth, saying that it is not an intrusion because it does no more than track something that you could track with the eye, where you plant a beeper in a vehicle or something like that, that it could be followed. Well, five months —you can't—it's not possible to follow around for five months. That's what happened here as a result of having that beeper in there for five months. All told, I think a warrant for a beeper, under these circumstances, was required.

As far as the affidavit, I will say possibly there are not too many outright blatant falsehoods, but as a result of half-truths, innuendos, deliberate attempt to create

an impression other than the actual fact, my view is that the original affidavit, as putting it bluntly, is as phony as a three-dollar bill. And then you have not only that, that it was deliberately conceived to give a false impression, and I might add, a good job was done in that regard. Reading of that affidavit, you come out with a far different impression of the facts than the actual truth.

Now, as to—I don't know that it would make any difference whether or not the affiant or the U. S. Attorney supplied additional information to a Magistrate issuing the affidavit or issuing the warrant, that is a Judge in this case, but under any circumstances, you have a flat conflict in the evidence between the D. E. A. agent and the U. S. Attorney, as to whether or not the Judge was told anything outside of the affidavit. Since the government created that situation, that conflict, it's easy to resolve, it goes against the government. I find that the Judge was not told anything outside of the affidavit, if that is material.

Now, I think the law is clear as far as the probable cause, you can't go outside of the affidavit, the sworn testimony. Just as far as what's right and what's wrong, it presents a terrible situation the government has done and created here.

Now, as far as standing, in my view, the installation of a beeper is a continuing search. It's not just a search when it's put on the can on the loading dock, or wherever, it's a search wherever that can is tracing. And that's the purpose of the whole thing, is to—and as is evident in this case, it did a good job. I say, accordingly, I think each person has standing, has demonstrated standing to challenge, except maybe the Defendant Rotl is the

only one I have a question about in that regard. Everyone else has demonstrated some connection with, or expectation of privacy where the can was intruded. Some have demonstrated ownership or possession of it. But rather than further complicate the situation. I will just grant the motion to suppress as to all of the Defendants.

Now, as to the fact that there might have been additional probable cause developed and shown as the matter went along, that might be so. But I don't think you can cure the ill if it hadn't been for the faulty beginning, it would have lost track of the whole thing right at the start, and the fact that they subsequently developed probable cause, I think, is just a product of the initial improper affidavit and deception of the Court.

Now, in granting the Motion to Suppress, let me—I will just add another thing. I take no—I think there is a great deal to be said for the Chief Justice's view that suppression is not necessarily the answer where the law officials do something improper. The Chief Justice's view that perhaps other solutions such as lawsuits, diciplinary action or other matters are more appropriate where perfectly reliable evidence is developed and then has to be suppressed because of something that has been done wrong, either deliberately or inadvertantly by the law officials. Unfortunately, this was done wrong, deliberately. Whether they thought they were doing wrong or not, they were. Perhaps one of these days the Chief Justice's view will prevail and will not be necessary to suppress reliable evidence because of the errors in malfeasance of the law enforcement officials. Those will be my findings and conclusions. And the order of the Court, the evidence seized at the—all of the evidence seized at

the search of the house in Taos, will be suppressed. That makes it unnecessary, I suppose, to rule on the severance of counts—the other two counts as to the Defendant Karo. It makes it unnecessary to rule as to the Horton confession. That Motion to Suppress will be granted. (RII 331-335)